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Written Comment of Jerry Dilliner
Gaming Commissioner of the Seneca Cayuga Tribe

This comment is given in addition to previous testimony.

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity on Indian lands is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. §2701(5).

The National Indian Gaming Commission (NIGC) has currently proposed regulations to create a "bright line" between class II Indian governmental gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701 et seq, and other forms of gaming. The NIGC proposed regulations (a) invade the authority of the Seneca-Cayuga Gaming Commissioner noted above and therefore usurp the sovereignty of Indian government; (b) arbitrarily and capriciously restrict class II game descriptions; (c) impose rules to make class II gaming unprofitable; and and interject the NIGC as the primary contact for one class of vendors in gaming without statutory authority.

Such action is contrary to IGRA, federal court cases, prior NIGC regulations, tribal and NIGC government to government game determinations, and previous NIGC game determinations.

The justification for the Chairman of the NIGC to create a "bright line" between class II and other forms of gaming is absent. The "bright line" is not required by statute and/or court cases. The statute that created the class II definition and category of gaming of 25 U.S.C. §2703 recognizes that a "bright line" is not possible. IGRA, as 25 U.S.C. §2701 et seq. is called, identifies a list of player interactive games which may be played with electronic aids as class II

gaming in Indian governmental gaming. Total electronic or electromechanical copies of such games are considered to be in another class. Thus, a class II game, fully copied electronically, moves to another class when played by Indian governmental gaming. When a fully electronic or electromechanical copy or facsimile of a class II game moves to another class simply because of its fully electronic nature, no "bright line" is possible. By IGRA definition, class II and other games may look exactly alike. By IGRA definition, the difference in electronic aided class II games and other games is player participation in game play.

The "bright line" desire of the NIGC is further exposed as a concept which cannot be sustained because class II definition only exists within Indian governmental gaming. Commercial gaming remains free of NIGC restriction to copy profitable class II games and intentionally blur the legal lines of participation to increase profits. In short, commercial gaming is free to mimic successful class II concepts and blur the lines between class II and commercial gaming. If class II gaming makes money, commercial gaming has incentive to mimic class II play. A "bright line" cannot be established by restricting Indian governments when commercial gaming is unfettered unless either commercial gaming is restricted by law or class II governmental gaming is unprofitable, thereby removing commercial gaming incentive.

GAME ARCHITECTURE

Computer technology and computer cost reduction during the 1990s presented an opportunity for Indian governmental gaming in class II. Central servers managing numbers and delivering the opportunity to win to multiple player terminals was a good match with the games identified in class II to be electronically aided in play. Commercial gaming was, by contrast, in the last century focused on a stand alone machine versus the individual concept. Even video

poker, a player interactive game occupying about twenty percent (20%) of most commercial gaming floor space, continues to be player versus machine game. Indian governmental gaming requirements from an architecture standpoint are simple for class II:

1. Player inactive (to avoid electronic facsimile issues and maintain player versus player concepts);
2. Class II named game IGRA.

Many commercial industry publications have identified the ease of such game architecture identification. Indeed, even the NIGC has in government to government consideration with the Eastern Shawnee Gaming Commission addressed and approved a Cadillac Jack game as a class II game.

The Cadillac Jack game identified in government to government negotiations as a class II game is excluded from class II by NIGC propose regulations.

The server based class II systems developed by Indian governmental gaming also allowed software changes to alter gaming floor look and feel without expensive terminal or box replacement. Commercial gaming has noted the profitability of class II games, the benefits of server gaming, and has copied class II concepts. Player interaction with the game screen is now becoming commonplace in commercial gaming as is server linked progressive jackpots. Player tracking ease with server links has also caused commercial gaming to review class II architecture. The concept of game changes by software only swaps has also not gone unnoticed by commercial gaming.

The “bright line” between Indian class II and commercial gaming has changed, not only because class II bingo is offered with a slot like alternate display, but also because the server

aided list of class II games of Indian governmental gaming have presented commercial gaming with new profitable concepts and ideas to be copied.

The NIGC cannot create a "bright line" when commercial gaming has incentive to copy not only the games, but the class II game architecture made popular by innovative Indian governments. Differences in class II governmental gaming and commercial gaming are artificially created by IGRA and limit only Indian governments. No "bright line" is possible with electronic facsimiles being in another class for Indian governmental gaming and commercial gaming pursuing the commercially viable aspect of class II architecture.

DIRECT RELATIONSHIP WITH VENDOR

The proposed regulations intrude on the sovereignty of Indian governmental gaming by seeking to form a direct relationship between the NIGC and gaming laboratories, a vendor to Indian gaming. In at least one case, the Justice Department has successfully plead on behalf of the NIGC that a game vendor has no standing before the NIGC. IGRA gives no role for the NIGC to interact directly with vendors except for management entities.

In the proposed regulations, the NIGC proposes to give the NIGC authority as the sole entity to select gaming laboratories and to review such laboratories' opinions. The design of the proposed regulations favor a few existing laboratories and prevent new laboratories from gaming work with Indian governments. The NIGC should take notice that <u>every</u> communication with gaming laboratories over the last two years and perhaps before will be scrutinized under a microscope if these regulations are advanced. Why has the NIGC proposed to put itself in charge of this class of vendors? Why are Indian governments required to use an independent laboratory if the Indian government is capable of such testing? The ability of Indian

governments to become an independent laboratory under the NIGC regulations is made nearly impossible. When the Muscogee Creek Nation Gaming Commission has a budget of about Five Million Dollars ($5,000,000.00) annually, the Muscogee Creek government may have little need of an independent laboratory.

The entire laboratory process described in the regulations not only usurps Indian sovereignty and discretion exercised by the Seneca-Cayuga Gaming Commissioner pursuant to the tribe's gaming code approved by the NIGC, but provides no due process basis for either Indian government nor a proposed laboratory vendor to challenge NIGC selection process or address laboratory decision of the NIGC. The need for due process is emphasized by the fact that proposed regulations equate a fact judgment call of a private laboratory with a finding of legality by a government court.

The NIGC's concept of delegating a nonlegal authority to make an unappealable, legal determination only subject to review by the NIGC Chairman challenges the existing role of Tribal Gaming Commissioners, tribal gaming codes, compacts, and due process. The concept places power and financial benefit in a few non-Indian private laboratories without Indian government input.

COURTS AND SOVEREIGNTY

Court Cases

The federal government's previous efforts to limit class II gaming have resulted in five successfully litigated cases by Indian governments: *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); 9th Circuit, *United States v. 103 Electronic Gambling Devices*, 223 F.3d at 10806 (9th Cir. 2000); *Diamond Games*

Enterprises, Inc. v. Janet Reno, et al., 230 F.3d 365 (D.C. Cir. 2000); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994); and *Seneca-Cayuga Tribe of Oklahoma, et al. v. National Indian Gaming Commission, et al.*, 327 F.3d 1019 (10th Cir. 2003). Please note the Seneca-Cayuga Tribe was in two of the above cases.

Indian governmental regulators have successfully identified class II games and architecture in each of the above cases. Moreover, under the proposed regulations of the NIGC, few of the games authorized by court decision, if any, qualify for play under the NIGC proposed regulations. NIGC proposed regulations ignore that the primary regulator, Tribal Gaming Commissions, have been making the right decisions. Court decisions have tended to settle legal controversy.

The actions of the NIGC, in its proposed regulations, invade Indian sovereignty, exceed IGRA statutory authority of the NIGC. Based upon the court cases cited, Indian governments have been more successful than the federal government, including the NIGC, in identification of class II games. No rationale basis exists for the NIGC to usurp Indian sovereignty by the regulations proposed. The NIGC record shows that multiple game opinions issued by the NIGC determining games to be class II in nature will be at odds with the proposed NIGC regulations. The proposed NIGC regulations conflict with prior NIGC determinations. The NIGC invasion of tribal sovereignty included in NIGC proposed regulations makes even less sense when one considers that existing NIGC regulations endorsed by the last two circuit court cases cited must be withdrawn to promulgate the NIGC proposed regulations.

Federal courts have rejected many of the specific class II game restrictions contained in

current NIGC proposed regulations. Commercial gaming publications have characterized the efforts of game restriction in current NIGC regulatory proposes as NIGC efforts to pull Indian governments back from control of the current profitable class II gaming and limit the profitability of class II gaming.

The NIGC efforts to invade tribal government authority and sovereignty recognized in 25 U.S.C. §2701 will create legal uncertainty in an area of settled case law and undoubtedly create litigation.

DEPARTURE FROM CURRENT LAW

The multiple regulatory requirements of the current proposal of the NIGC ignore that federal circuit courts have held that only three requirements exist for bingo:

1. Play for prizes with cards bearing numbers or other designations;
2. Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
3. Win the game by being the first person to cover a designated pattern on such cards;

See *United States v. 103 Electronic Gambling Devices*, 223 F.3d at 10801, FN. 4 (9th Cir. 2000). Even fewer requirements should be addressed by games similar to bingo and other named class II games.

The Justice Department litigation staff has conceded in consultation with Indian government representatives in 2005 that, the Justice Department did not want NIGC regulations to go forward without amendments to IGRA and the Johnson Act, 15 U.S.C. §1171 et seq., because the same Indian lawyers would go to the same federal courts in front of the same federal judges and have the same Indian victory.

Ignoring public statements of the Justice Department and well-established case law is not a sound basis for the NIGC to make regulatory changes.

In consultation and speech, the NIGC concedes that current class II games will no longer be class II under the proposed regulations. The two games successfully litigated by the Seneca-Cayuga Tribe in federal court may be prohibited under the proposed regulations. How can the proposed regulations be sustained against this factual background?

Not only would the profitability of electronically aided class II Indian governmental gaming be economically impacted, class II Indian governmental gaming with electronic aids will be destroyed. Has the NIGC given any consideration to the financial impact of the proposed regulations? If so, were the considerations made before publication of such proposed regulations?

In sum, Congress made Indian governments the primary regulators of Indian gaming in IGRA. Since 1988, class II Indian gaming has expanded and been defined by discussion, NIGC game opinion, tribal government review, federal court review, and even joint tribal and NIGC government to government review. The NIGC proposed regulations respect none of those processes. Eighteen (18) years after IGRA, the NIGC seeks to amend 25 U.S.C. §2701 by regulations and vest the NIGC with authority to make decisions instead of supporting tribal government sovereignty. The proposed regulations do not establish a "bright line" between class II and other gaming; rather, the proposed regulations dissolve class II as currently played by Indian governments.

Indian gaming is a Twenty-Two and One-Half Billion Dollar ($22,500,000,000.00) annual industry. If the federal authorities want to create a "bright line" for class II gaming, the

NIGC is invited to seek new statutory authority to regulate not only Indian government, but also commercial gaming. NIGC regulatory proposals are acknowledged by the Justice Department to be unsustainable in court. NIGC regulatory proposals ignore government to government game negotiations between tribal gaming commissioners and the NIGC.

The NIGC is asked to follow its existing regulations and engage in indepth government to government consultation with interested tribes and, thereafter, withdraw the proposed regulations.